

REPUBLIC OF KENYA
HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR. MISC CASE NO.E149 OF 2024

**SHERWIN MBOGO NJOROGE1ST EXPARTE
APPLICANT**

ANTONY KAMAU CHEGE2ND EXPARTE APPLICANT

RONALD KAGUNYI NJUGUNA3RD EXPARTE APPLICANT

VERSUS

**THE DIRECTORATE OF CRIMINAL
INVESTIGATIONS.....1ST RESPONDENT**

**OFFICE OF THE DIRECTOR OF PUBLIC
PROSECUTIONS.....2ND RESPONDENT**

JUDGMENT

1. The Application that is before this court for determination is the one dated 27th November, 2024 wherein the Applicant's seeks the following: -

- 1) That an Order of Certiorari to issue to remove to this Honourable Court for purposes of being quashed and forthwith quash the 2nd Respondent's decision to charge the Exparte Applicants with the offence of obtaining money by false pretenses contrary to Section 313 of the Penal Code and conspiracy to defraud contrary to Section 317 of the Penal Code.

- 2) That Order of Prohibition, prohibiting the 2nd Respondent from charging the Exparte Applicants with the offence of obtaining money by false pretenses contrary to Section 313 of the Penal Code and conspiracy to defraud contrary to Section 317 of the Penal Code.
- 3) A declaration be and is hereby issued that the intended charges of obtaining money by false pretenses contrary to Section 313 of the Penal Code and conspiracy to defraud contrary to Section 317 of the Penal Code are null and void as they are a breach, infringement, violation and denial of the Exparte Applicants' fundamental rights to equality before the law, equal protection, equal protection and equal benefit of the law as enshrined in Article 27 (1) and 50 of the Constitution.
- 4) That the costs of this Application be borne by the Respondents.

The Applicants' Case:

2. On or about 2nd May, 2018 the 1st Exparte Applicant entered into a sale agreement with one Stephen Kareithi Mukami for sale of Plot Number 76 in Land Reference Number 7969 with the 1st Exparte Applicant as the vendor and the said Stephen Kareithi Mukami the Complainant for a purchase price was Kenya Shillings Seven Million One Hundred Thousand (Kshs. 7,100,000/= which amount was paid to the 1st Exparte Applicant.
3. That upon completing payment of the purchase price, the complainant let the same out to a third party. The 1st Exparte Applicant had purchased the said property from David Waweru

Kahinga and Christine Imbosa Mbogua all that parcel of land known as Land Reference Number 7969 which they had caused to be subdivided into more than 100 plots with Plot Number 76 being one of the subdivisions.

4. The law firm of the 2nd and 3rd Exparte Applicants (Kamau Chege & Kagunyi Advocates) had been retained by the joint owners to specifically handle all conveyancing related transaction involving Land Reference Number 7969 and the subdivisions therein.
5. The said law firm acted for the 1st Exparte Applicant and the Complainant in the sale of the said plot.
6. On or about the 27th March, 2023 the Nairobi Environment & Land Court delivered a judgment in ELC 189 of 2015 whereby the court made a declaration that Kimuri Housing Company Ltd, was the banafide beneficial owner as a purchaser for value of Land Reference Number 7969 and the court restrained the joint owners by themselves, servants and/or agents from interfering with Land Reference Number 7969.
7. The Exparte Applicants argue that they only became aware of Nairobi ELC Number 189 of 2019 after the judgment.
8. It is their case that the said judgment is subject of an ongoing appeal before the Court of Appeal that is Civil Appeal Number 611 of 2023. The Complainant lodged a criminal complaint against the Exparte Applicants.

- 9.** The criminal complaint, on the 7th December, 2023 the 1st and 2nd Exparte Applicants were summoned by Corporal Geoffrey Mwangi an officer with the 1st Respondent with summons.
- 10.** They further argue that they appeared before the said officer on 8th December, 2023 at the Nairobi Regional Command and provided the officer with all the relevant information.
- 11.** It is their case that on 23rd May, 2024 the said officer summoned the 1st Exparte Applicant again.
- 12.** On 13th June, 2024 the 1st Exparte Applicant appeared before the officer ready to give his statement on the transaction but the officer advised him that he was not ready to take his statement and advised him that he will summon him at a later date.
- 13.** On 26th July, 2024 the officer summoned all the Exparte Applicants and after an extensive meeting the officer advised the 1st Exparte Applicant to prepare and deliver to him a draft statement which the 1st Applicant prepared and delivered to the officer who advised that he will have a look at the statement and advice.
- 14.** On 23rd September, 2024 the Exparte Applicants were again summoned and the 1st and 2nd Exparte Applicant who appeared before the officer were informed that the 2nd Respondent had directed and/or consented to criminal charges being preferred against them.
- 15.** Consequently, the 1st and 2nd Exparte Applicants were released on cash bail. The 3rd Exparte Applicant appeared before the officer on 25th September, 2024. They were directed to appear in court on 27th

September, 2024. They maintain that they are entitled to the orders sought.

The Applicants' Submissions:

16. They submit that the issue for determination by the court is whether the decision of the Respondents to charge the Exparte Applicants was legal, rational and procedurally sound.
17. They place reliance in the case of **Pastoli v Kabale District Local Government Council & Others, [2008] 2 EA 300**, the court held that:

“In order to succeed in an Application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 CUR).”

18. In **Philomena Mbete Mwilu v D.P.P & 3 Others [2019] eKLR** the learned judge stated that:

“With regard to the process or manner of the conduct of investigations, the court in Josephat Koli Nanok & Another v Ethics & Anti-Corruption Commission (supra) went on to consider what an investigation process might entail. It stated that the person subject of the investigation would be entitled to fair administrative action, so that before a decision is taken for

the prosecution of the suspect, the investigative agency must observe that person's rights by granting him or her the opportunity to respond to the allegation. It was observed that there would be as a matter of course, a preliminary inquiry, conducted internally, before the formal investigations, and that it should be at the formal investigation stage that the suspect is entitled to be heard”

- 19.** They submit that the 1st Respondent failed to accord them an opportunity to be heard. Despite the investigating officer summoning them he deliberately and maliciously failed to conduct investigations on the issues raised by the Exparte Applicants and also deliberately and with hidden intent failed to record their statements.
- 20.** The 1st Respondent proceeded to forward the file to the 2nd Respondent without the statements and documentary evidence submitted to it by the Exparte Applicants.
- 21.** The investigations officer at paragraph 18 of his affidavit admits that he did not carry out investigations on the issues raised by the Exparte Applicants. He stated:

“That in response to paragraphs 37,38,39,40,41,42,43 and 44 the Exparte Applicants are introducing facts strange to the 1st and 2nd Respondents as the same does not form part of the matter that was investigated.”

- 22.** They submit that the decision to charge the Exparte Applicants is a result of the misguided notion by the Respondents that the Exparte

Applicant were aware of the existence of Nairobi ELC No. 189 of 2015 at the time of selling the property to the complainant.

- 23.** The facts and issues raised by the Exparte Applicants were explanations that the Exparte Applicants proffered against the accusations levelled against them.
- 24.** The Exparte Applicants by the said explanation sought to debunk and deconstruct the erroneous notion that they were aware of Nairobi ELC No. 189 of 2015 at the time of sale of the property to the complainant.
- 25.** The Exparte Applicants clearly explained that upon the 1st Exparte Applicant selling the property to the complainant he entered into an agreement with RAJPAL KATANA KAZUNGU and LILIAN RIZIKI KAHINDI for sale and purchase of Plot No. 86 contained as subdivision in L.R. No. 7969 as the property sold to the complainant.
- 26.** The 1st Exparte Applicant further explained that the funds he received from the complainant is what he used to purchase the other parcel from Rajpal Katana Kazungu and Lilian Riziki Kahindi Kenya Shillings Two Million Eight Hundred Thousand (Kshs. 2,800,000/=) only as a refund to Edward Kimani who had initially purchased the land from Rajpal Katana Kazungu and Lilian Riziki Kahindi but failed/and or was unable to complete the transaction and Kenya Shillings One Million Five Hundred Thousand (KShs. 1,500,000/=) only paid to Rajpal Katana Kazungu and Lilian Riziki Kahindi.
- 27.** The Exparte Applicants contended that the 2nd and 3rd Exparte Applicants are also beneficial owners for value of plots within L.R.

No. 7969 which have substantially been developed and as such were also affected by the decision in Nairobi ELC No. 189 of 2015.

28. They submit that the foregoing issues, facts and evidence that the investigating officer contends at paragraph 18 of the replying affidavit did not form part of the matter and thus were not investigated.
29. Article 244 of the Constitution and Section 24 of the National Police Service Act vests the powers and mandate of investigations of crimes upon the police.
30. They submit that it was stated thus in **Republic v Service & 2 others; Resilient investments Limited & 3 others (Interested Party); Limited (Exparte) (Judicial Review Application E037 of 2021) [2022/KEHC 43 (KLR):**

"Investigation of the crime is a solemn duty imposed by law on the police officers. The duty of the investigating officer is not merely to bolster up a prosecution case with such evidence as may enable the courts to record convictions but to bring out the real unvarnished truth."

31. It was incumbent upon the 1st Respondent to investigate all the issues and facts as raised by both the complainant and the Exparte Applicant and to not only focus its attention on the issues raised by the complainant in an obvious attempt to bolster the prosecution case.
32. Had the 1st Respondent conducted proper investigations including recording of the Exparte Applicants' statements, scrutinizing the

documents submitted by the Exparte Applicants and all the details given by the Exparte Applicants they would have definitely arrived at the inescapable conclusion that the Exparte Applicants were not aware of Nairobi ELC 189 of 2015 and thus the intended charges of obtaining money through false pretenses cannot stand.

- 33.** The Applicants beseech the court to review the decision as the 1st Respondent failed to take into account relevant consideration.
- 34.** In **Republic v Kenya School of Law & another; Abdi (Exparte) (Judicial Review Miscellaneous Application Eo88 of 2022) [2023] KEI-IC 17633 (KLR)**, the court held:

"The right to be heard is protected under Article 50 of the Constitution it is an inalienable right it is a cardinal principle that is protected under Article 25 of the Constitution, In MWN v/DK eKLR the court had occasion to consider the question of the right to be heard. It pronounced itself that the interests of justice lead a court to exercise discretion."

- 35.** The complainant contended that since the 1st Exparte Applicant's ownership of the property had been compromised, the contract was incapable of being performed in the foreseeable future. The complainant therefore sought to invoke the default clause by demanding refund of the purchase price.
- 36.** They submit that the Exparte Applicants were of a contrary view and opined that the parties should await the outcome in Civil Appeal Number 611 of 2023 which was filed against the judgment in Nairobi ELC No. 189 of 2015.

37. Reliance is placed in **Paul Stuart Imison Another vs. the Attorney General & 2 Others Petition No. 57 of 2009** in the following manner:

"The instances in which a court can declare a prosecution to be improper were well considered in Macharia & Another – vs- Attorney General & Another (2001) KLR 448. A prosecution is improper if:

- a) It is for a purpose other than upholding the criminal law;*
- (b) It is meant to bring pressure to bear upon the Applicant/accused to settle a civil dispute;*
- b) It is an abuse of the criminal process of the court;*
- c) It amounts to harassment and is contrary to public policy;*
- d) It is in contravention of the Applicant's constitutional right to freedom. (Emphasis added)."*

38. In **Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69**, the High Court held:

"The Court has power and indeed the duty to prohibit the continuation of the criminal prosecution if extraneous matters divorced from the goals of justice guide their instigation. It is a duty of the court to ensure that its process does not degenerate into tools for personal score-settling or vilification on issues not pertaining to that which the system was even formed to

perform...A stay (by an order of prohibition) should be granted where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the society's senses of fair play and decency and/or where the proceedings are oppressive or vexatious... The machinery of criminal justice is not to be allowed to become a pawn in personal civil feuds and individual vendetta. It is through this mandate of the court to guard its process from being abused or misused or manipulated for ulterior motives that the power of judicial review is invariably invoked so as to zealously guard its (the Court's) independence and impartiality (as per section 77(1) of the Kenya Constitution in relation to criminal proceedings and section 79(9) for the civil process). The invocation of the law, by whichever party in unsuitable circumstances or for the wrong ends must be stopped, as in these instances, the goals for their utilisation is far from that which the courts indeed the entire system is constitutionally mandated to administer... In the instant case, criminal prosecution is alleged to be tainted with ulterior motives, namely the bear pressure on the Applicants in order to settle the civil dispute.”

- 39.** They decry the usage of the criminal proceedings by the complainant while being propped by the 1st Respondent to arm twist and/or coerce the Exparte Applicants to refund the purchase price.

The Respondents' Case:

- 40.** The Respondents oppose the Application vehemently through the investigating officer.

41. It is the investigating officer's case that he received a complaint from the complainants in relation to the land they had purchased from the Applicants which they believed tainted with fraud.
42. It is his case that upon conducting investigation, he found that the Applicants had received money as consideration from a sale from the complainants which they had shared between themselves.
43. This was established from their bank statements and cheques that were paid to the Applicants.
44. It is his case that in order to complete the investigation he recorded the complainant's statements and summoned Applicants who refused to record their statements. He was forced to forward the investigations report to the 2nd Respondent who returned the file for further investigation
45. He summoned and issued the Applicants a charge and caution before sending the file back to the 2nd Respondent who made a decision to charge the Applicants. It is his case that according to him there was a crime that had been committed by the Applicants.
46. It is the investigating officers' case that the Applicants knew of the existence of the civil suit at the time of selling the land to the complainants.
47. The 1st Respondent argues that the decision to charge the Applicants was pegged on the fact that the investigations established that there was a prima facie case that the Applicant's had committed fraud.

The 2nd Respondent's Submissions:

48. It submits that under Article 157(6) of the Constitution, the DPP is mandated to institute and undertake criminal proceedings against any person before any court.

“The Director of Public Prosecutions shall exercise state powers of prosecution and may-(a)institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.”

49. Reliance is placed in the case of **Pauline Raget Adhiambo Agot v DPP and 5 Others (2010) Petition No. 446 of 2015** the court stated:

“It must first be stated that the clear intention of the Constitution was to ensure that the Office of the Director of Public Prosecutions was free of any interference or meddling. No person or body including the court ought to instruct or direct the 1st Respondent on how to conduct its business as to investigating crime and prosecuting offenders. Indeed, it is the 1st Respondent who is enjoined under Article 157(4) of the Constitution to direct the National Police Service to investigate any criminal activities. On the other hand, members of the public are also morally obligated to report incidents of crime to the ODPP and DCI.”

50. Moreover, in the case of **Republic v The Commissioner of Police & the Director of Public Prosecution Ex parte Michael Monari & another Misc. ApplicationNo. 68 of 2011, Nairobi,**

in determining whether the ODPP and DCI had abused their statutory and constitutional powers, the Learned Judge stated that:

“... the Police have a duty to investigate any complaint once a complaint is made. Indeed, the police would be failing in their constitutional mandate to detect and prevent crime. The Police only need to establish reasonable suspicion before preferring charges. The rest is left to the trial court.”

51. Article 157(4) provides that: -

(4) The Director of Public Prosecutions shall have power to direct the Inspector-General of the national police service to investigate any information or allegation of criminal conduct and the Inspector General shall comply with any such direction.

52. Article 157(11) stipulates that:

(11) In exercising the powers conferred by this article, the director of public prosecutions shall have regard to the public interest, the interests of the administration of justice and the need to prevent and avoid abuse of the legal process.

53. It is submitted that the DPP was presented with a complete investigative file and made the Decision to Charge and that this decision was not made on a whim but guided by the Constitution, the ODPP Act, 2012 and the Decision to Charge Guidelines.

54. It is the 2nd Respondents' submission that The DPP in its Guidelines on the Decision to Charge, 2019 (the Guidelines to charge) also

correctly captured the role of the prosecutor once investigations are completed.

55. The 2nd Respondent in making the decision to charge the petitioner acted within his constitutional mandate.
56. Upon concluding investigations, the DCI established that there was a reasonable suspicion that an offence had been committed, hence prompting them to forward the investigation file to the 2nd Respondent for review and directions.
57. In the Michael Monari Case (Supra) the court stated that the police only need to establish reasonable suspicion that an offence had been committed before any charges can be preferred.
58. In the case of **Cascade Company Limited vs Kenya Association of Music Production (KAMP) & Others, Petition No. 7 of 2014** High court, Murang'a the court stated as follows-

“... In my view, as long as the enabling legislation is constitutional, the Respondent’s actions ensuing therefrom are lawful unless, of course, it can be demonstrated that the ODPP and DCI have in their actions, breached those very provisions or have acted ultra vires to the act. Simply put the Respondents should not be inhibited unnecessarily from exercising their constitutional and statutory mandates.”

59. It is further submitted that Section 193A of the Criminal Procedure Code mandates civil proceedings to be heard concurrently with any criminal matter.

- 60.** Section 193 A of the Criminal Procedure Code provides that ‘any matter in issue in any criminal proceedings which was also directly or substantially in issue in any pending civil proceedings could not be a ground for any stay, prohibitions or delay of the Criminal proceedings. Concurrent proceedings meant independent, simultaneous investigations and prosecutions involving substantially the same matter and parties.
- 61.** It was submitted that whereas the Applicants had the right not to be subjected to an illegal and /or unwarranted criminal process, the DPP was also under a public duty to ensure that offences were prosecuted and those culpable attended to as the law required.
- 62.** Reliance is placed in the case of **Maina & 4 others vs Director of Public Prosecutions & 4 Others 9 Constitutional Petition E106 & 160 of 2021 (Consolidated) (2022) KEHC 15 (KLR)** (Constitutional and Human Rights) (27 January 2022) (Judgment).
- 63.** It is the 2nd Respondent’s submission that the considerations that guide courts when considering an Application such as this were best captured in the words of Mason CJ in **William and Others v Spautz [1993] 2 LRC 659 at 667** where the High Court of Australia stated as follows:

“It is of fundamental importance that, unless the interests of justice demand it, courts should exercise, rather than refrain from exercise, their jurisdiction, especially their jurisdiction to try persons charged with criminal offences, and that persons charged with such offences should not obtain an immunity from

prosecution. It is equally important that freedom of access to the courts should be preserved and that litigation of the principal proceeding, whether it be criminal or civil, should not become a vehicle for abuse of process issues on an Application for stay, unless once again the interests of justice demand it.”

64. Further, it is an established principle that where a party alleges a breach of fundamental rights and freedoms, he or she must state and identify the rights with precision and how the same have been or will be infringed in respect to him.
65. The Honorable Justice J. Mativo aptly held as follows in **Leonard Otieno v Airtel Kenya Limited [2018] eKLR** It is a fundamental principle of law that a litigant bears the burden (or onus) of proof in respect of the propositions he asserts to prove his claim. Decisions on violation of constitutional rights should not and must not be made in a factual vacuum. To attempt to do so would trivialize the constitution and inevitably result in ill-considered opinions. The presentation of clear evidence in support of violation of constitutional rights is not, a mere technicality; rather, it is essential to a proper consideration of constitutional issues. Decisions on violation of constitutional rights cannot be based upon the unsupported hypotheses.
66. Article 160 of the constitution provides; in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall not be subject to the control or direction of any person or authority.
67. They submit that the Applicants shall enjoy the right to equal protection in any court of law and a fair administrative process.

68. They submit that the Applicants have not set out with precision the manner in which the 2nd Respondent has infringed their fundamental rights and freedoms to warrant the intervention of this Honourable Court.

69. In the case of **Anarita Karimi Njeru v Republic (No.1)-[1979] KLR 154** the Court stated;

“...if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed.”

70. They also rely on the Court of Appeal in **Mumo Matemo v Trusted Society of Human Rights alliance [2014] eKLR**, where it stated that:

“...the principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court... Procedure is also a handmaiden of just determination of cases. Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle”

71. The 2nd Respondents submit that the Applicants have not indicated the rights which have been breached with clarity, apart from enumerating the Articles in the Constitution.

Analysis and determination;

Issues for determination:

- 1) Whether civil and criminal proceedings can move concurrently.
 - 2) Whether an advocate can be charged for offences committed by their client.
 - 3) Whether the Application has merit.
 - 4) Costs.
72. Section 193A of the Criminal Procedure Code Cap 75 Laws of Kenya provides for parallel trial of civil and criminal proceedings. The Section reads:

“193A. Concurrent criminal and civil proceedings

Notwithstanding the provisions of any other written law, the fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any pending civil proceedings shall not be a ground for any stay, prohibition or delay of the criminal proceedings.”

73. In **Republic v Inspector General of the National Police Service & another Ex parte Beatrice Hilda Omunia; Peter Nganga Chege & 2 others (Interested Parties) [2019] eKLR,**

Hon. Justice John Mativo J. as he was then, while commenting on the above provision held as follows at paragraph 32 of his Judgment:

"Even though it is not for this court to consider the defense of the accused persons, which is basically a function of the trial court, the core issue raised by the ex parte Applicant is that the dispute is purely civil. Section 193A of the Criminal Procedure Code permits parallel civil and criminal proceedings, hence, even if there was a civil suit in court, the existence of a parallel civil case is not bar to criminal proceedings. [14] The offence being investigated is known to the law, hence, the cited provision. The conduct under investigation can attract a criminal sanction if proved."

74. The fact that there are civil proceeding that are pending before another forum is not a bar to the criminal prosecution that is pending before the criminal court that the Applicants think to challenge. The court agrees with the 1st Respondent on this.

The second issue is whether an advocate can be charged for offences committed by their client.

75. Though advocates enjoy certain privileges owing to the nature of their profession, the same is not absolute. An advocate can be charged with a criminal offence. In the instant case it is not clear whether the cheques that were paid to 2nd and 3rd Applicants were part of the fruits of the crime that the complainants were pursuing.
76. This court cannot delve into a merit analysis that would help settle that issue. That is what the criminal court or the Advocates

disciplinary Tribunal would determine upon hearing witness testimonies and upon production of documents like the retainer between the Applicants. That is not for the judicial review court.

77. In so holding, I am guided by the **Court of Appeal at Nairobi [Coram: W. Karanja, Tuiyott & Nyamweya JJ. A] Civil Appeal No. 337 Of 2019 Between Dr. Gabriel Mukuria Muturi And Director, Kenya Forestry Research Institute (Kefri) And Dr. Jane Wangu Njuguna**, where that court referred to the Supreme Court in *Saisi & 7 others vs Director of Public Prosecutions & 2 others* [supra] it is not the purpose and intent of a merit review in judicial review to undertake full-fledged inquiry into the merits of a matter. The Supreme Court explained as follows:

“76. Be that as it may, it is the court’s firm view that the intention was never to transform judicial review into to full -fledged inquiry into the merits of a matter. Neither was the intention to convert a judicial review court into an appellate court. We say this for several reasons. First, the nature of evidence in judicial review proceedings is based on affidavit evidence. This may not be the best suited form of evidence for a court to try disputed facts or issues and then pronounce itself on the merits or demerits of a case. More so on technical or specialized issues, as the specialised institutions are better placed to do so. Second, the courts are limited in the nature of reliefs that they may grant to those set out in section 11(1) and (2) of the Fair Administrative Actions Act. Third, the court may not substitute the decision it is reviewing with one of its own. The court may not set about

forming its own preferred view of the evidence, rather it may only quash an impugned decision. This is codified in section 11(1) (e) and (h) of the Fair Administrative Action Act. The merits of a case are best analyzed in a trial or on appeal after hearing Page 20 of 24 Judgment- NAI Civil Appeal No 337 of 2019. Testimony, cross-examination of witnesses and examining evidence adduced. Finally, as this court held in the case of Kenya Vision 2030 Delivery Board v Commission on Administrative Justice, Attorney General and Eng Judah Abekah, SC Petition 42 of 2019; [2021] eKLR, in matters involving the exercise of judgment and discretion, a public officer or public agency can only be directed to take action; it cannot be directed in the manner or the particular way the discretion is to be exercised.”

The next issue whether the Application has merit:

- 78.** In order to determine this issue the court is guided by the case of ***JGH Marine A/S Western Marine Services Limited CNDC Northeast Refining & Chemical Engineering Company Limited/ Pride Enterprises vs The Public Procurement Administrative Review Board & 2 others [2015] eKLR***, (hereinafter, “***the JGH Marine Case***”) Justice W. Korir, while canvassing issues of what constitutes an error of law and ultra vires made reference to the Halsbury’s Laws of England and stated as follows at paragraph 90 of his judgment:

“There is a general presumption that a public decision-making body has no jurisdiction or power to commit an error of law; thus, where a body errs in law in reaching a decision or making

an order, the court may quash that decision or order. The error of law must be relevant, that is to say it must be an error in the actual making of the decision which affects the decision itself. Even if the error of law is relevant, the court may exercise its discretion not to quash where the decision would have been no different had the error not been committed. Where a notice, order or other instrument made by a public body is unlawful only in part, the whole instrument will be invalid unless the unlawful part can be severed. In certain exceptional cases, the presumption that there is no power or jurisdiction to commit an error of law may be rebutted, in which case the court will not quash for an error of law made within jurisdiction in the narrow sense. The previous law which drew a distinction between errors of law on the face of the record and other errors of law is now obsolete. A public body will err in law if it acts in breach of fundamental human rights; misinterprets a statute, or any other legal document, or a rule of common law, takes a decision on the basis of secondary legislation, or any other act or order, which is itself ultra vires; takes legally irrelevant consideration into account, or fails to take relevant considerations into account, admits inadmissible evidence, rejects admissible and relevant evidence, or takes a decision on no evidence, misdirects itself as to the burden of proof, fails to follow the proper procedure required by law; fails to fulfil an express or implied duty to give reasons or otherwise abuses its power...In order for an Applicant to move the Court into giving orders on the ground that a tribunal has committed an error of law, the Applicant must

demonstrate that there is indeed a mistake that goes to the jurisdiction of the tribunal. Misinterpretation of the law is not sufficient to move a judicial review Court to action.”

- 79.** In determining this issue, the court has looked at the legality of decision to charge the Applicants.
- 80.** The Applicants raised a host of concerns around the refusal to furnish them with the information surrounding and the decision to charge them. The action by the officers of the 2nd Respondent to proceed to charge the Applicants without first recording the Applicants statements remained unresolved as at the time the 2nd Respondent decided to charge the Applicants.
- 81.** The Applicants were summoned by the investigating officer to record their statements severally. They have given the various dates that they were summoned and expressed their wiliness to record their statements when the investigations officer was not ready for them.
- 82.** The 1st Respondent's argument that the Applicants refused to go and record statements is not credible. He would have arrested the Applicants if he was serious about conducting comprehensive investigations. He failed to do that and he cannot blame the Applicants. The Applicants even wrote a letter to the Respondent raising concerns around the investigations lapses. The letter was not responded to.
- 83.** Section 7 (1) of The Fair Administrative Actions Act, No. 4 of 2015 gives this court the power to review an administrative action or

decision, if the person who has made the decision has acted in excess of jurisdiction or power conferred under any written law and has been reasonably suspected of bias.

- 84.** It is this court's finding that in arriving at the decision to charge the Applicants, the 2nd Respondent has breached its duties under Article 157 (1) of the Constitution which requires him to always act judiciously and not in a manner that ends up in the perpetuation of an unfair and malicious criminal complaint.
- 85.** Article 157 of the Constitution commands the 2nd Respondent to prevent and avoid the abuse of the legal process through the criminal justice system is ensured, and to this end this Honourable Court has the jurisdiction to stop any process of prosecution that can lead to abuse of power.
- 86.** The Applicants requested for information around the decision to charge them with the offences before the trial court was not attended to.
- 87.** Clause 3.1.1 of the guidelines on the decision to charge stipulates that the decision to charge or not to charge requires an objective and independent analysis of the case. This accords with the Fair Administrative Action Act.
- 88.** The 1st and the 2nd Respondents are seized of the information that the 2nd Respondent used in arriving at the decision to charge the Applicants. Had this not been the case then the Respondent would not have proceeded to charge the Applicants in the criminal court.

- 89.** The decision to charge the Applicants that is inaccessible to the Applicants cannot amount to a legal decision by any standards. It fails the test of the fairness that Article 47 of the constitution which guarantees all to the right to fair administrative action. Since the Applicants challenged the decision to charge them this court would have expected the director of public prosecution to furnish the court with the decision to charge the Applicants in their responses. This was not done.
- 90.** The decision that is not made available for scrutiny by the court cannot be said to be one that was inspired by objectivity. It would have helped the Applicants and this court to appreciate not only how the decision was arrived at but also appreciate the decision to charge itself.
- 91.** That would have promoted the right to access to information under Article 35 and the right to fair hearing as guaranteed under Article 50 of the Constitution.
- 92.** When arriving at the decision to charge, the prosecutors must be objective and must not let personal views based on ethnic or national origin, gender, disability, age, religion or belief, sexual orientation, status, or gender identity of a suspect, accused person, victim or any witness influence their decision. They must at all times remain apolitical.
- 93.** The 1st Respondent argued that upon conclusion of the investigations they sent the investigations file to the ODPP twice who according to the 1st Respondent confirmed that based on the investigations there

was a prima facie case that informed the decision to charge the Applicants.

- 94.** In all cases prosecutors must complete the Decision to Charge Form ODPP 1A and lodge it in the relevant Prosecution File. This form was not availed to the Applicants.
- 95.** The only plausible conclusion that I can safely arrive at in the circumstances is that the decision to charge the Applicants was informed or arrived at on the basis of ulterior motives and that the process and the outcome were tainted with illegalities and fundamental procedural improprieties.
- 96.** Everybody has a right to access to information in the custody of an independent Constitutional outfit like the ODPP whenever it is exercising its powers under Article 157.
- 97.** The ODPP must at all times be at the forefront in, ensuring that suspects of crime are informed in very clear and available terms of not only how the decision to charge was arrived at but also ensure that the accused persons are furnished with the decision to charge.
- 98.** The ODPP is under a duty to furnish a suspect with all the information including the considerations and factors that the prosecution considered in arriving at a decision to charge them whether or not they request for the information.
- 99.** The importance and the duty of the ODPP to disclose the Decision to Charge through Form ODPP 1A to an accused person cannot be

gainsaid. The Form I not a cosmetic or confidential document that is intended to benefit the ODPP only.

- 100.** The duty is elevated a notch higher where a person who is exposed request for this critical information. This is the only way that we shall talk of a process that is expeditious, efficient, lawful, reasonable and procedurally fair.
- 101.** The ODPP will not suffer any prejudice if that kind of information is disclosed to a suspect or an accused person immediately the decision to charge is made.
- 102.** This disclosure or the discovery will go a long way in promoting, our national values and the principles of governance in so far as the criminal justice system is concerned. In any event, the decision to charge guidelines 2019 are a public document that is not supposed to benefit only the ODPP's office.
- 103.** It is meant for the people under Article 1 of the Constitution who voted in the Constitution. The investigations, and the running of the office of the ODPP is funded by the people through the taxes. As such the people have a legitimate expectation that they will have access to the results or the outcomes of the investigation and in particular the decision to charge them with offences whenever they commit crime as provided for under Form 1A.
- 104.** More awareness creation programmes should be rolled out to inform and create awareness to Kenyans and in particular suspects upon arrest that they have a right to access to the guidelines and decision to charge in Form 1A.

105. This will go a long way in promoting the tenets access to justice and the social transformation through access to justice blue print of The Chief Justice.

106. The decision to charge marks a point in the prosecution Journey, when a suspect, or an accused person is a very vulnerable member of the society. The Decision to Charge Form ODPP 1A must be availed to an accused person immediately and without delay, the minute the decision to charge is made.

107. Section 2 of the Fair Administrative Action Act provides that;

“Administrative Action;

ii) Includes-any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;

‘Administrator’

Means a person who takes an administrative action or who makes an administrative decision. This includes the ODPP when deciding to charge.

Section 4 further stipulates that;

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-(d) a statement of reasons pursuant to section 6.”

- 108.** An early disclosure of the decision to Charge Form ODPP 1A will help open up early alternative dispute resolution possibilities at the decision to charge phase thereby reduce the number of cases in the criminal court encouraging early diversion and reconciliation and Alternative Justice redress mechanisms as provided for under Article 159(2) of the Constitution.
- 109.** Section 6(1) of the FAA provides that Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her Application for an appeal or review in accordance with section 5 (2) The information referred to in subsection (1), may include-(a) the reasons for which the action was taken; and (b) any relevant documents relating to the matter. (3) The administrator to whom a request is made under subsection (1) shall, within thirty after receiving the request, furnish the Applicant, in writing, the reasons for the administrative action.
- 110.** The well-intended guidelines and the decision to charge in form ODPP 1 cannot be said to be in conformity with Section 6 of the FAA if all that the ODPP does is to complete the decision to charge form ODPP 1a before shuttling the accused person to court.

- 111.** The supreme court in the case of **Githiga & 5 Others V Kiru Tea Factory Company Ltd (Petition 13 Of 2019) [2023] KESC 41 (KLR) (16 June 2023) (Judgment)** held that under article 50(2) of the constitution procedural fairness in the administration of justice involved the fair hearing rule that required a decision maker to inter alia afford a person an opportunity to be heard before making any decision affecting his/her interests.
- 112.** The right to fair hearing will not be complete without this kind of dialogue.
- 113.** In the case of **Pastoli Vs Kabale District Local Government Council & Others, (2008) 2 Ea 300**, where it was held that:

“In order to succeed in an Application for Judicial Review, the Applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See Council of Civil Service Union v Minister for the Civil Service [1985] AC 2; and also, Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR).

Illegality is when the decision-making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority,

addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: Re an Application by Bukoba Gymkhana Club [1963] EA 478 at page 479 paragraph “E”.

Procedural impropriety is when there is failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876).”

- 114.** In the instant suit this court has arrived at the safe conclusion that the Respondents and the office of the director public prosecutions acted illegally in failing to furnish the Applicants with the decision to charge them. The failure to respond to the Applicants’ letter aggravated the infraction and I so hold.
- 115.** The Applicants had a legitimate expectation that the Respondents would accord them a process that was not only fair, but legitimate. From the forgoing, it is clear that this was not achieved.
- 116.** The sum totality of forgoing is that the prosecution is tainted with illegality and massive procedural improprieties that justify the insurance of the orders sought which I hereby allow.

The court now looks at the question whether or not the order of prohibition can be issued as sought.

- 117.** In the case of **Kenya National Examination Council versus Republic ex parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR**, the Court stated the grounds upon which such an order of prohibition may issue as follows;

“What does an order of prohibition do and when will it issue” It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY&39; S LAW OF ENGLAND, 4th Edition, and Vol.1 at pg. 37 paragraphs 128”

- 118.** In the instant case, the court has already made a finding that the Respondents acted illegally. The proceedings in the trial court cannot be sustained in the basis of an illegal foundation and the Prayer for an order of prohibition is hereby granted as prayed in so far as the criminal Proceedings are concerned.
- 119.** The intended charges of obtaining money by false pretenses contrary to Section 313 of the Penal Code and conspiracy to defraud contrary to Section 317 of the Penal Code cannot be sustained in the light of the earlier mentioned infractions.

120. In determining whether the Applicant has proven its case, I am guided by The Supreme Court in **Samson Gwer & 5 others v Kenya Medical Research Institute & 3 others (2020) KLR** where it was held as follows:

“(49) Section 108 of the Evidence Act provides that, “the burden of proof in a suit or procedure lies on that person who would fail if no evidence at all were given on either side;” and Section 109 of the Act declares that, “the burden of proof as to any particular fact lies on the person who wishes the court to believe in its existence, unless it is provided by any law that the proof of that fact shall lie on any particular person.”

121. The court finds that the Applicants have proven their case.

The issue of costs;

122. In **Party of Independent Candidates of Kenya versus Mutula Kilonzo a 2 others HC EP No. 6 of 2013**, the court stated as follows on the issue of costs:

"It is clear from the authorities that the fundamental principle underlying the award of costs is two-fold. In the first place, the award of costs is a matter in which the trial judge is given discretion but this is a judicial discretion and must be exercised upon grounds on which a reasonable man could come to the conclusion arrived at. In the second place the general rule that costs should be awarded to the successful party, is a rule which should not be departed from without the demonstration of good grounds for doing so."

123. In *Halsbury’s Laws of England*, 4th ed Re-Issue (2010), Vol. 10, para. 16:

*“The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid. Where costs are in the discretion of the court, a party has no right to costs unless and until the court awards them to him, and the court has an absolute and unfettered discretion to award or not award them. This discretion must be exercised judicially; **it must not be exercised arbitrarily but in accordance with reason and justice**”* [emphasis supplied].

124. The Applicants are entitled to costs.

Disposition;

125. The Application has merit.

Order;

- 1) The Application is allowed.
- 2) Costs to the Applicants.

Dated, signed and delivered at Nairobi this 13th day of February, 2026.

.....

J. CHIGITI (SC)

JUDGE